No. 14-940

Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

In the Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIALCAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellee.

On Appeal from the United States District Court for the Western District of Texas

BRIEF AMICUS CURIAE OF TENNESSEE STATE LEGISLATORS AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF APPELLANTS

Linda Carver Whitlow Knight
Gullett Sanford Robinson
& Martin PLLC
Suite 1700
150 Third Avenue, South,
Nashville, TN 37201
615-244-4994
lknight@gsrm.com

(additional counsel for Amici Curia are listed inside the front cover)

John J. Park, Jr.
Counsel of Record for Amicus Curiae
Strickland Brockington Lewis LLP
1170 Peachtree Street NE,
Suite 2200
Atlanta, GA 30309
678.347.2208
jjp@sbllaw.net

Carrie Severino
Judicial Education Project
722 12th St. NW, Fourth Floor
Washington, DC 20005
(571) 357-3134

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. This appeal presents a substantial question worthy of this Court's review. 5

A. This Court has long recognized that the question presented remains unsettled. 5

B. This appeal presents this Court with an opportunity to explain what the one-person, one-vote principle means in a factually compelling setting. 8

C. This Court's experience prior to *Baker v. Carr* demonstrates the danger in summarily affirming the district court's decision in this case. 10

II. Reliance on total population to the exclusion of measures of actual potential voters will over-weight urban districts and voters while under-weighting rural districts and voters. 13

A. The history of the application of one-person, one-vote standards to redistricting plans shows that it inexorably pulls districts toward areas with greater population. 14

B. The unlimited use of total population for reapportionment purposes without consideration of other measures threatens rural interests. 19

C. The problem of vote dilution is a problem that extends beyond Texas. 22

Conclusion 25

TABLE OF AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 8

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

Baker v. Carr, 247 F. Supp. 629 (M.D. Tenn. 1965) 24

Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959) 11

Brown v. Thomson, 462 U.S. 835 (1983) 9

Chen v. City of Houston, 121 S. Ct. 2020 (2002) 5

Chen v. City of Houston, 206 F. 3d 502 (5th Cir. 2000) 12

Colegrove v. Green, 328 U.S. 549 (1946) 6,11

Garza v. County of Los Angeles, 918 F. 2d 763 (9th Cir. 1991) 8,21

Kidd v. McCanless, 200 Tenn. 273, 292 S.W. 2d 40 (Tenn. 1956) 11,22

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

White v. Regester, 412 U.S. 755 (1973) 9

Constitutional Provisions

TENN. CONST. Art. II, §§ 5 and 6 22

Rules

37.2(a) 1

37.6 1

Other Authorities

Pet. For Cert., *Lepak v. City of Irving*, No. 12-777, in the Supreme Court of the United States 20

Publications

J. Harvie Wilkinson, III, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, 1945-1966 (Univ. Press of Va. 1968). 18

Matthew D. McCubbins, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 AM. J. OF POL. SCI. 388 (1988). 24

IDENTITY AND INTEREST OF AMICI CURIAE

This amicus brief is submitted by rural legislators from the States of Tennessee and by the Judicial Education Project in support of the arguments of the Evenwel Appellants.[1] Amici write separately to encourage this Court to review the question presented and to point out how using total population alone for reapportionment purposes without the consideration of alternate counting methods can unfairly, unreasonably, and unconstitutionally dilute rural votes.

Amici Tennessee Senators each represent rural districts as follows:

Lieutenant Governor Ronald Ramsey represents the 4th District covering Johnson County, which contains the town of Johnson City; Sullivan County, which contains the towns of Bristol and

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Communications reflecting such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or its counsel made a monetary contribution to the brief's preparation or submission.

Kingsport; and part of the lightly-populated county of Carter.

Senator Mae Beavers represents the 17th District, which covers the lightly-populated counties of Cannon, Clay, DeKalb, Macon, and Smith and Wilson County, which contains the town of Lebanon.

Senator Mark Green represents the 22nd District, which covers the lightly-populated counties of Houston and Stewart and Montgomery County, which contains the small city of Clarksville.

Senator Delores Gresham represents the 26th District, which covers the lightly-populated counties of Chester, Decatur, Fayette, Hardeman, Hardin, Haywood, Henderson, and McNairy.

Senator Ferrell Haile represents the 18th District, which covers the county of Trousdale; Sumner County, containing the towns of Gallatin and Henderson; and a more-lightly populated, suburban area of Davidson County (Metropolitan Nashville).

Senator Jim Tracy represents the 14th District, which covers the lightly-populated counties of Bedford, Lincoln, Marshall, and Moore and a suburban portion of Rutherford County, which contains the small city of Murfreesboro.

The Judicial Education Project (JEP) is a national, non-profit educational institution dedicated

to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited powers, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media. JEP has filed amicus briefs in numerous cases in this Court and in the federal courts of appeals, including this Court's 2013 case *Shelby County v. Holder*.

SUMMARY OF ARGUMENT

Since this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), it has been clear that States and localities have a constitutional obligation to redraw their legislative and administrative districts in compliance with the principle of one-person, one-vote. As this Court explained, "The overriding objective must be substantial equality of population among the various districts, so that the vote of one citizen is approximately equal in weight to that of any other citizen in the State. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). *See also id.* at 577 (States and localities must "make an honest and good faith effort to construct districts ... as nearly of equal population

as is practicable," although "[m]athematical exactness or precision" is not required).

This appeal shows that the use of total population as the basis for apportionment can conceal significant differences in the actual voting strength of districts and thereby violate the mandate of *Baker*. Actual voting strength can be measured by considering total voter registration, non-suspense voter registration, or citizen voting-age population. When the use of total population produces an overall population deviation that is greater than that allowed by this Court or by the jurisdiction[2], unconstitutional vote dilution results.

This Court should note probable jurisdiction and address whether Texas's use of total population for apportionment purposes fails one-person, one-vote standards because the resulting plan denies some voters—in this case, rural voters— an equal vote. This Court must rectify the unconstitutional reapportionment of the Texas Senate, reverse the district court's erroneous ruling, and reaffirm the mandate of *Baker* and *Reynolds*.

---

[2] In the most recent round of redistricting following the release of the 2010 Census results, Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin used an overall deviation of 2% or less to redistrict one or both houses of their respective legislatures. See *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1246 (M. D. Ala. 2013) (three-judge court), appeal pending, Nos. 13-895, 13-1138, in the United States Supreme Court.

ARGUMENT

This appeal is worthy of review for two reasons. First, it presents a substantial, unsettled question of constitutional construction that will only become more pressing if this Court does not act. Second, the unfair and imbalanced use of total population figures has upset the balance between urban and rural interests in many states to the detriment of rural voters. This is not the first case in which this issue has been before the Court, and rural voters will have no recourse if this Court does not rectify this recurring pattern.

I. This appeal presents a substantial question worthy of this Court's review.

This appeal presents a question which this Court has noted but has not settled: whether apportionment must be based on eligible voter population or whether apportionment based solely on total population is sufficient to satisfy one-person, one-vote standards.

It also offers this Court an opportunity to clarify the one-person, one-vote principle. As Justice Thomas has observed, if the Court is to require that jurisdictions to comply with one-person, one-vote, it "ha[s] an obligation to explain to States and localities what it actually means." *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2002) (Thomas, J., dissenting from the denial of certiorari). Allowing

jurisdictions to choose their measure of population for apportionment purposes creates a significant loophole allowing districts to be created with wide variations in voting strength.

In addition, leaving the choice of a counting method to the State or locality on the ground that it presents a political issue is redolent of the superseded approach of *Colegrove v. Green*, 328 U.S. 549 (1946), and ignores the existing law laid down in *Baker* and *Reynolds* which held that courts have a role to play in ensuring equal representation across districts.

A. This Court has long recognized that the question presented remains unsettled.

In *Burns v. Richardson*, 384 U.S. 73 (1966), this Court observed, "We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Id.* at 91. It upheld Hawaii's use of registered voter data for an interim apportionment applicable to only one election for the State Senate, explaining that it found "no demonstrated error in the District Court's conclusion that the apportionment achieved by use of a registered voter basis substantially approximated that which would

have appeared had state citizen population have been the guide." *Id.* at 96.

The Court pointed out, "We are not to be understood as deciding that the validity of the registered voter basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere." *Id.* In the nearly 40 years since *Burns v. Richardson*, this Court has still not identified whether the use of total population as the sole basis for reapportionment is constitutional when it results in a substantial deviation. In 1969, the Court "assum[ed] without deciding that apportionment may be based on eligible voter population rather than total population...." *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969). Similarly, the Court declined to decide whether "school enumeration figures" might be used instead of "actual population figures" in *Hadley v. Junior Coll. Dist. of Metro Kansas City, Mo.*, 397 U.S. 50, 57 n. 9 (1970).

In his dissent from the denial of certiorari in *Chen*, Justice Thomas noted that allowing jurisdictions to choose how to count their populations could make the one-person, one-vote principle "of little consequence." 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari). Earlier, Judge Kozinski had also pointed to the competition between using total population as the basis for apportionment on the one hand and equalizing voting power on the other. He recognized that

"[a]pportionment by population can result in unequally weighted votes...." *Garza v. County of Los Angeles*, 918 F. 2d 763, 781 (9th Cir. 1991) (Kozinski, concurring in part and dissenting in part). In Judge Kozinski's view, "It is very difficult ..., to read the Supreme Court's pronouncements ... without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Id.* at 782. Thus, at least on Justice and a prominent Court of Appeals judge have concluded not only that the question presented is substantial, but also that the Evenwel Appellants' position is meritorious.

B. This appeal presents this Court with an opportunity to explain what the one-person, one-vote principle means in a factually compelling setting.

This appeal provides an appropriate vehicle for resolving the important questions left open by this Court. In their Complaint, the Evenwel Appellants allege that "[m]any" of the Texas Senate districts are "severely over- or under-populated with electors relative to other districts in the State." J.A. at 26a, ¶ 27.[3] When the population of the districts is measured by citizen voting-age population, total voter registration, and non-suspense voter

---

[3] Because this case was addressed and resolved on a motion to dismiss, the nonconclusory allegations of the Evenwel Appellants' complaint should be taken as true. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

registration instead of total population the overall population deviation ranges from 46.77% to 55.06%. J.A. at 27a. Evenwel's and Pfenninger's Senate districts likewise have overall population deviations from the ideal population that exceed 30.81% for each of the alternate measures. J.A. at 28a, 30a. The Evenwel Appellants allege, "The effect of this severe overpopulation of electors is that the Plaintiffs' votes carry far less weight than the votes of other citizens in districts that are under-populated with electors." J.A. at 31a, ¶ 31.

This Court has observed that, for state and local redistricting plans, "an apportionment plan with a maximum population deviation under 10% does not violate the Fourteenth Amendment." *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also White v. Regester*, 412 U.S. 755 (1973); *but cf. Larios v. Cox*, 300 F. Supp. 2d 1320 (N. D. Ga.), *aff'd*, 542 U.S. 947 (2004) (Georgia legislative plans with an overall deviation of less than 10% violate one-person, one-vote standards). In contrast, a plan with an overall deviation of more than 10% "creates a prima facie case of discrimination and therefore must be justified by the State." *Id.* at 843.[4]

---

[4] This Court found that a Wyoming legislative plan with overall deviations larger than 10% could be justified by the "peculiar size and population" of Wyoming, the absence of any bias in favor of rural or urban interests, and the *de minimis* effect on voters. *Brown v. Thomson*, 462 U.S. at 843-47. Even so, its approval of a plan with an average deviation from population

The deviations in voting strength in the Texas Senate plan far exceed those deemed constitutional. In *Larios v. Cox*, the district court found that Georgia's legislative plans "plainly violate the one person one vote principle embodied in the Equal Protection Clause" even though the overall deviation of 9.98% was less than 10%. 300 F. Supp. 2d at 1322. The court explained that plans "arbitrarily and discriminatorily dilute[d] and debase[d] the weights of certain citizens' votes by intentionally and systematically underpopulating rural districts in rural south Georgia and inner city Atlanta, correspondingly overpopulating the districts in suburban areas surrounding Atlanta, and by underpopulating the districts held by incumbent Democrats." *Id.* In the same way here, Texas has inexplicably diluted the votes of rural voters by drawing Senate districts based solely on total population when other methods of constitutionally apportioning districts were readily available.

C. This Court's experience prior to *Baker v. Carr* demonstrates the danger in summarily affirming the district court's decision in this case.

Treating the choice of a counting method as a political question facilitates an end run around one-person, one-vote requirements. Just such an end run

---

equality of 16% and an overall deviation of 89% must be regarded as an outlier.

took place in the lead up to *Baker v. Carr*. After this Court held that Illinois' failure to redraw its congressional districts for 40 years presented a political question in *Colegrove v. Green*, it took the Court 16 years to correct that problematic precedent. In *Baker v. Carr*, this Court finally reversed a district court's reliance on the political question doctrine and held that Tennessee's failure to reapportion its legislature since 1901 was unconstitutional.[5] That failure had resulted in a legislature in which political power was grossly skewed in favor of rural districts.

Two years later, this Court again rejected a district court's reliance on *Colegrove* in dismissing a malapportionment-based challenge to Georgia's congressional plan. *Wesberry v. Sanders*, 376 U.S. 1 (1964). It built on *Baker* to hold that, for congressional redistricting purposes, "as nearly as is practicable one man's vote in a congressional

---

[5] This Court reversed the district court's dismissal of the case in reliance on *Colegrove* and its progeny. *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959) (three-judge court). In addition, it retreated from its action dismissing the appeal in *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W. 2d 40 (Tenn.), *appeal dismissed*, 352 U.S. 920 (1956). In *Kidd*, the Tennessee Supreme Court all but threw up its hands in holding that the Tennessee legislative reapportionment plan approved in 1901 could not be set aside in the 1950s because there was nothing to replace it.

election is to be worth as much as another's." *Id.* at 7-8 (footnote omitted); *see also Reynolds v. Sims.*

In this case, the district court held that the Evenwel Appellants failed to state a claim as to which relief could be granted because the use of total population as the sole metric was not unconstitutional and the resulting overall population deviation was less than 10%. J.A. at 8a. In so doing, the district court followed the Fourth and Fifth Circuits, which, like the pre-*Baker* courts, left this serious constitutional question to the political process. *See Daly v. Hunt*, 93 F. 3d 1212, 1227 (4th Cir. 1996); *Chen v. City of Houston*, 206 F. 3d 502, 523 (5th Cir. 2000), *cert. denied*, 542 U.S. 1046 (2001). By relegating this issue to the political process, the district court overlooked the way in which facial compliance with one-person, one-vote standards masks substantial vote dilution. Absent intervention from this Court, such vote dilution will recur because the problem is not limited to Texas, as discussed below.

Amici respectfully contend that this Court should not allow the issue to fester any longer. This case is an appropriate vehicle for considering it and for reaffirming *Baker* and *Reynolds.*

II. Reliance on total population to the exclusion of measures of actual or potential voters will overweight urban districts and voters while underweighting rural districts and voters.

This Court's early one-person, one-vote cases were the product of apportionment schemes that systematically gave disproportionate political power to rural interests. This appeal shows that the shoe is now on the other foot; the use of total population alone in redistricting over-weights the votes from urban areas to the detriment of those from rural areas. Moreover, while the Evenwel Appellants have shown that the problem is readily apparent in Texas, it is not a Texas-only issue.

As this Court has held, the votes of urban and rural voters should be equally weighted. *See, e.g.*, *Reynolds*, 377 U.S. at 562-63 ("Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there."); *Wesberry*, 376 U.S. at 8 ("It would be extraordinary to suggest that ... the votes of inhabitants in some parts of a State ... could be weighted at two or three times the votes of people living in more populous parts of the State ...."). To the extent that one-person, one-vote compliance has moved districts toward urban and suburban areas in response to actual shifts in voting population density, Amici do not object. This appeal is not, however, one of those fair applications of this

principle. Rather, by including non-voters and inhabitants who are not eligible to vote, who are heavily concentrated in urban districts, in the total population for reapportionment purposes, the Texas Senate plan unfairly inflates the figures for urban districts to the detriment of rural districts and voters. Reapportioning done in this manner is as unconstitutional as not reapportioning at all, a violation that this Court remedied in *Baker*.

A. The history of the application of one-person, one-vote standards to redistricting plans shows that it inexorably pulls districts toward areas with greater population.

In the early redistricting cases, like *Baker v. Carr* and *Reynolds v. Sims*, the complaints came from parts of the State that were underrepresented. In *Baker*, the plaintiffs were residents of Davidson (Nashville), Hamilton (Chattanooga), Knox (Knoxville), Montgomery (Clarksville), and Shelby (Memphis) Counties. 369 U.S. at 204.[6] In *Reynolds*, the original plaintiffs came from Jefferson County (Birmingham), which was and is the most populated

---

[6] In 1950, Davidson, Hamilton, Knox, and Shelby counties were the most populated in the State, and Montgomery County had more population than many others. *See* http://archive.knoxmpc.org/locldata/popdata/tn_counties_hist_pop.pdf.

in the State. 377 U.S. at 537. Additional plaintiffs came from Mobile and Etowah (Gadsden) Counties. *Id.* at 541.[7] The *Baker* and *Reynolds* plaintiffs asserted that the overpopulation of their urban districts and the underpopulation of rural ones unconstitutionally diluted their votes.

In *Reynolds*, this Court held that the overriding objective must be substantial equality of population among the various districts, so that the vote of one citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579; *see also Board of Estimate v. Morris*, 489 U. S. 688, 701 (1989) (quoting *Reynolds*). It rejected Alabama's reliance on both the 1901 constitutional plan and alternate plans that were drawn using counties as building blocks. Some counties, typically the urban ones, were far more populated than other rural ones, and the resulting population deviations were enormous.

For example, in the 1901 Alabama House plan, which was still in effect, changes between 1901 and 1960 meant that Bullock County, with a population of 13,462, and Henry County, with a population of 15,286, got two seats each, while Jefferson County, with 634,864 people, got seven

---

[7] In 1960, Jefferson and Mobile were the most populated counties, and Etowah was the sixth most populated. *See* https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=1960%20population%20in%20alabama%20by%20county.

seats. *Id.*, at 545-46.[8] Under that arrangement, 27.5% of the residents could elect a majority of the House.

Alabama's continued reliance on counties as building blocks meant that the alternate House and Senate plans also failed one-person, one-vote scrutiny. Under a proposed alternative House plan that would be adopted by constitutional amendment, some 43% of the State's population could elect a majority of the House, and the population-variance ratio would be 4.7:1. *Id.* at 549. The proposed statutory House plan was not quite so balanced. Under it, "about 37% of the State's total population would reside in counties electing a majority of the members of the Alabama House of Representatives, with a maximum population-variance ratio of about 5-to-1." *Id.* at 549-50.

The Senate plans had correspondingly large population disparities. By 1960, 25.1% of the State's total population could elect a Senate majority using the 1901 Senate districts. *Id.* at 545. The proposed constitutional amendment, which contemplated giving one senator to each of the 67 counties, would

---

[8] Bullock County is southeast of Montgomery and Montgomery County, while Henry County is the second county north of Florida along the line between Alabama and Georgia. In the 2010 Census, Bullock County had only 10,915 residents, and Henry County had just 17, 302. In contrast, Jefferson County had 658,456 residents.
See www.ador.state.al.us/licenses/census.html.

have given the smallest 34 counties a majority of the Senate seats even though the total population of those counties was less than that of Jefferson County. *Id.* at 547.

As this Court said, "[I]t is inconceivable that a state law to the effect that, in counting votes for legislators, *the votes* of citizens in one part of the State would be multiplied by two, five, or 10, while *the votes* of persons in another area would be counted only at face value, could be constitutionally sustainable." *Id.* at 561 (emphasis added). Such an "inconceivable" counting could not be avoided so long as counties remained the building blocks for Alabama's legislative plans. The rural counties were too numerous for the urban counties to counterbalance.

The application of one-person, one-vote standards to an expanded, non-discriminatory electorate in Alabama has resulted in greater representation for urban and suburban areas. In the most recent round of redistricting, the areas that grew the most were Madison County outside Huntsville, Shelby County just south of Birmingham, and Baldwin County, across Mobile Bay from Mobile. The 2012 legislative redistricting plans necessarily spread that overpopulation into neighboring districts.

In much the same way, the application of one-person, one-vote principles to an expanded electorate brought about the end of the Byrd Machine in Virginia. In HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, 1945-1966 (Univ. Press of Va. 1968), the Honorable J. Harvie Wilkinson III ("Judge Wilkinson") traced the way in which the Machine, originally based in the Shenandoah Valley and Southside Virginia, gradually gave way to the political power of the urban and suburban corridor from the Northern Virginia suburbs of Washington, D.C., through Richmond to the Tidewater.

The swing in political power began with population growth "within th[e] urban corridor," which also had little in common with the rural and agricultural parts of the State favored by the Machine. *Id.* at 195, 170-76. While the urban areas grew, the central Southside Virginia counties that were part of "the Byrd organization's traditional strongholds" lost population. *Id.* at 161-62.

The change in the locus of power became apparent after Virginia's 1962 redistricting was set aside as the result of a lawsuit filed by urban interests. *Id.* at 248-49. The new redistricting coincided with a dramatic expansion of the electorate. *Id.* at 258-59. The political consequences of these changes were quickly apparent. Lyndon Johnson in 1964, Governor Mills Godwin in 1965, and Senator William Spong in 1966 each prevailed

with the help of the new and urban voters over opposition from the rural white voters who were the strong supporters of the Byrd machine. *Id.* at 346.

Today, 50 years after *Baker v. Carr* and *Reynolds v. Sims*, compliance with one-person, one-vote standards generally entails increasing the geographical coverage of rural districts to compensate for growth in urban and suburban areas.

B. The use of total population for reapportionment purposes without consideration of other measures threatens rural interests.

The examples of Tennessee, Alabama and Virginia show that the natural trajectory of one-person, one-vote pulls legislative districts toward more populated, typically urban and suburban parts of the State. This appeal shows how that process can unfairly and unconstitutionally burden rural interests by impermissibly counting ineligible residents in urban and suburban districts who are included in the total population count. While one would reasonably presume that there would be more people who are not eligible to vote in urban areas than in rural areas simply because there are more people in urban areas, there is evidence to support this presumption.

First, this appeal shows that the underpopulated districts are urban and the overpopulated districts are rural. Appellant Evenwel lives in Titus County in rural northeast Texas, and Appellant Pfenninger lives in Montgomery County north of Houston. *See* J. S. App. D, at 19a-20a, ¶¶ 6, 7. They allege that their districts are underpopulated in terms of citizen voting-age population, total voter registration, and non-suspense voter registration. *Id.* at 27a-30a. In contrast, the districts that are underpopulated with voters are largely urban or suburban, and three of the five most underpopulated are in Houston.

Moreover, previous cases show how voters are not equally distributed geographically. In *Lepak v. City of Irving*, for example, the petition for certiorari showed that the difference between total population and voting age population in the city council districts was not uniform. *See* Pet. For Cert. at 9, *Lepak v. City of Irving*, No. 12-777, in the Supreme Court of the United States. Instead, while the total population for District 1, was 31,642, its voting-age population was 20,930, and its citizen voting-age population was only 11,231. *Id.* In contrast, the most populated District, District 5, had a total population of 33,126, a voting-age population of 26,000, and a citizen voting age population of 19,673. *Id.* As a result, District 5 had a total population that was greater than that of District 1 by 1,484, but its voting-age population was 5,070 greater, and its

citizen voting-age population was 8,442 larger. Ostensible compliance with one-person, one-vote standards thus concealed striking differences in the actual voting strength of the city council districts.

Likewise, in *Garza v. County of Los Angeles*, which involved the county commission for the County of Los Angeles, a low overall deviation of 0.68 nonetheless did not yield balanced districts. *See* 918 F. 2d at 773. As Judge Kozinski noted, "[T]he supervisor from District 1 can be elected on the basis of 353,826 votes ..., while the supervisor from District 3 requires at least 549,332 votes. Put another way, a vote cast in District 1 counts for almost twice as much as a vote cast in District 3." *Id.* at 780 (Kozinski, concurring in part and dissenting in part). He observed that, if qualified electors and not total population were used for the apportionment, the deviation between District 1 and District 3 in the Los Angeles County commission plan, which was 40%, would not satisfy one-person, one-vote standards.

While the instant appeal illustrates the rural/urban divide, *Lepak* and *Garza* show the same kind of inequality in the voting strength of districts at the local level. Whether statewide or local, however, the reliance on total population alone for reapportionment, with no consideration of voter population, will dilute the votes of many voters in

elections for offices ranging from city councils to the state legislature.

C. The problem of vote dilution is a problem that extends beyond Texas.

The Tennessee Amici are concerned about ensuring proper, constitutional reapportionment. After all, the *Baker* case itself arose in Tennessee. As discussed above, by the 1950s, the Tennessee General Assembly had not reapportioned its districts since doing so after the 1900 census, leaving Representatives and Senators from rural districts with undue power in the wake of the massive migrations to more urban districts during those 50 years. The rural legislators were determined to hold on to that power, and refused pleas from urban legislators to reapportion. Appeals to the Tennessee Constitution, which requires decennial reapportionment and provides that the houses shall be apportioned based on qualified voters[9], their claims fell upon deaf ears. A lawsuit was filed in state court, but the Tennessee Supreme Court's refused to grant relief in *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W. 2d 40 (Tenn. 1956). The plaintiffs turned to the federal courts, initiating *Baker v. Carr*. It took this Court's intervention to rectify the impasse and equalize the voting power of

[9] TENN. CONST. Art. II, §§ 5 and 6.

Tennessee's urban citizens. The thrust of *Baker* and its progeny is that all votes must count equally, or as equally as possible within a narrow range of permissible deviation.

Tennessee has taken the mandate of *Baker* and the principle of one person, one vote to heart. The General Assembly and the state courts have been conscientious about applying these rules. *See, e.g., State v. Crowell*, 631 S.W.2d 702 (Tenn. 1982). Tennessee amici believe that legislatures should be apportioned in a way that complies with this Court's precedents. If the district court's ruling in this case, and others like it, are allowed to stand, Tennessee's rural voters are likely to be as underrepresented as the State's urban voters were before *Baker*.

Several variables can lead to the geographically uneven distribution of voters. To the extent that total population and voting population can be attributed to the presence of minors who cannot vote, transient populations, and similar groups ineligible to vote, rural areas are more likely to have fewer of these. Rather, rural areas are likely to have older and more static populations and also to have higher rates of voter registration among citizens of voting age.

The over-weighting of urban voting strength to the detriment of rural voters translates into actual—not just theoretical—political and policy

effects. Urban interests will gain ground while rural ones suffer comparatively. *Cf.* Matthew D. McCubbins, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 Am. J. of Pol. Sci. 388 (1988) (identifying "one of the biggest policy stories of the past two decades" as "the continuing reallocation of federal policy benefits from rural to nonrural Americans" and finding it attributable "in part" to court-ordered congressional redistricting). As the Republican leader of the Virginia House of Representatives crowed after Virginia redrew its legislative districts in 1964, "Every close urban-rural conflict which in the past has resulted in a rural victory will now be an urban victory." HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, at 249.

This is illustrated by the fact that the failure of States like Illinois, Tennessee, Georgia, and Alabama to redraw their congressional or legislative districts for decades redounded to the political benefit of those who favored the status quo—in those cases, rural legislators.

These States and others learned their lesson, thanks to this Court's intervention. As one federal district court in Tennessee noted, the courts felt the impact of *Baker v. Carr*: "Since that decision, there have been literally hundreds of published opinions dealing with apportionment." *Baker v. Carr*, 247 F.

Supp. 629, 631 (M.D. Tenn. 1965) (three-judge court).

In the same way, reapportionment based solely on total population rather than a voter-based metric favors the political interests of those who live in the districts with more voting strength. This Court should break the logjam just like as did in *Baker v. Carr.*

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

John J. Park, Jr.
Counsel of Record for Amicus Curiae
Strickland Brockington Lewis LLP
1170 Peachtree Street NE, Suite 2200
Atlanta, GA 30309
678.347.2208
jjp@sbllaw.net

Linda Carver Whitlow Knight
Gullett, Sanford, Robinson & Martin PLLC
Suite 1700
150 Third Avenue South
Nashville, TN 37201
615-244-4994
lknight@gsrm.com

Carrie Severino
Judicial Education Project
722 12th St. NW, Fourth Floor
Washington, DC 20005
(571) 357-3134